

Following the Adarand decision, Omnipoint opposed extending the 49% exception to all small business entrepreneurs because, it alleged, that modification would "disempower all entrepreneurs." Ex Parte letter from M. Tauber and M. O'Connor, Counsel for Omnipoint Corporation, to FCC General Counsel, June 22, 1995, at 2. Furthermore, Omnipoint alleged, "Applying a 49% option to all small business applicants would deliver to big investors the ultimate negotiating tool with entrepreneurs. . . Undoubtedly, some will actually force conditions on applicants that step well into the gray areas regarding the limit of control as defined by the FCC." Id. Omnipoint further argued to in effect abolish the 49% equity exception by citing the racially disproportionate impact such a rule would engender.

However, Omnipoint has taken the exact opposite position before the Commission. For instance, Omnipoint alleged that "the proposed expansion of the 49% equity exception will probably harm minority applicants, as their potential investors could pull out of existing deals (or near deals) in search of better ones." Comments of Omnipoint, July 7, 1995 at 6. Again spouting contradictory rhetoric, the company told the Circuit Court: "The large, non-qualifying investors interested in a pre-auction 49% investment that have already finalized (or near finalized) their deals had to have done so with minority- or women-owned firms, leaving non-minority and male-owned entities with fewer remaining opportunities under this scheme." Omnipoint's Emergency Motion for Stay, July 24, 1995, at 16.

Omnipoint has reiterated that extending the 49% equity option to all parties would "significantly increase the temptation to create fronts either before, during or after the auction." Omnipoint Comments PP Docket No. 93-25, GN Docket No. 90-314. Omnipoint further contended that the 49% option "aids no one but the large investors and promises to

disenfranchise existing independent entrepreneurs from the Block C." Id. at 6. In reality, however, Omnipoint has never indicated that it would take advantage of the 49% option, and only seeks to limit its application in the Block C auction to curtail the number of competing bids it will encounter and to delay competition in New York by new licensees. Its arguments are inconsistent and without merit. Additionally, the 49% rule has not been widely used.

The Commission has agreed that Omnipoint has adopted confoundingly contradictory positions.:

Moreover, last month Omnipoint argued to the Commission -- totally contrary to its argument to this Court -- that extension of the 50.1% option "will probably harm minority applicants, as their potential investors could pull out of existing deals (or near-deals) in search of better ones. In fact, by opening up the 49% exception to all applicants (or all small businesses), investors would not need to partner with minority or women-owned applicants at all." Omnipoint Comments at 6-7 (J.A. \_\_). Thus, in July Omnipoint argued that extension of the 50.1% option on a race and gender neutral basis would harm minorities and women, but in August it argued that extension of the 50.1% option unconstitutionally harmed white males. It appears that Omnipoint is willing to make any argument that it finds useful at the moment.

Brief of Commission in Omnipoint v. F.C.C., No. 95-1374 at 44 (emphasis added).

Omnipoint's insistence now that outside investors must be limited to the 25% option conflicts with its earlier proposals that the FCC be more flexible concerning outside investors. Omnipoint argued on reconsideration of the Fifth Report and Order that the FCC should permit non-controlling investors to name 33% of a bidder's directors. See Omnipoint Petition for Clarification and Reconsideration at 13, PP Docket 93-253 (Aug. 22, 1994). Omnipoint also requested that the FCC increase the voting equity available to non-controlling investors, to alter its rules so that the assets and revenues of investors are not aggregate, and to

permit unlimited numbers of small businesses to aggregate their assets and revenues in "consortia." Id. at 6-10. These proposals, which largely were rejected by the FCC, see Reconsideration Order, 10 F.C.C. Rcd. at 419, would have permitted large entities to participate in the entrepreneurs' block to a far greater extent than the rules crafted in the Sixth Report and Order.

**2. Omnipoint Has Abused the Commission's Processes to Curtail Competition for Block C Licenses**

Although the Block C auction was designed to benefit small businesses/entrepreneurs, Omnipoint's anticompetitive actions actually create more of a barrier to small business entry. By creating a fictional need to stay the Block C auction, Omnipoint knowingly created uncertainty and delay, thereby driving away prospective investment and causing the cancellation of conditional investor commitments, precluding the acquisition of base station cell sites, hindering access to distributors and retailers, and draining the market share in the New York MTA. The resulting delay has permanently damaged the ability of petitioners to raise the necessary capital to participate in the auction. Omnipoint knowingly used the Commission's and the Court's process to raise a specious issue, simply to facilitate the delay of the auction and the resulting foreclosure of new competitors. See Emergency Motion of Intervenor Go Communications To Vacate Stay; see also Brief of Federal Communications Commission in Omnipoint v. F.C.C., No. 95-1374 at 43. Such abuse of process is sufficient to disqualify Omnipoint as a licensee. See Policy Regarding Character Qualifications, 102 FCC 2d 1179 (1986).

**C. Denying Omnipoint's License Will Serve The Public Interest**

Petitioners request that Omnipoint's anticompetitive behavior and character qualifications be designated for investigative evidentiary hearing, and that its preference license be denied. The Commission can accomplish that without injuring the federal or public interest. First, by denying Omnipoint's license, the federal government will lose no money from the Federal Treasury. Although Omnipoint is obligated to pay almost \$300 million, the company has not made an initial payment. Were the Block A New York MTA license to become available, the Commission could simply re-auction that license at the same time the Block C auction is held. In fact, the Commission already has taken that course of action with other licenses that were previously auctioned. It is currently scheduled to reauction licenses initially granted but subsequently forfeited by Interactive Video Distribution Service ("IVDS") applicants. Reauctioning the Omnipoint license may prove even more financially beneficial to the Treasury since the full fair market value of the license perhaps would be realized. It is appropriate that this license be reauctioned along with the Block C licenses because it was that group of applicants that Omnipoint's actions so severely harmed and thus they should be the beneficiaries of such an opportunity. To be consistent with other Block C licenses, the Commission should consider breaking the New York MTA license into the 27 BTAs that are contained in that region and then auctioning them at the same time as the C Block.

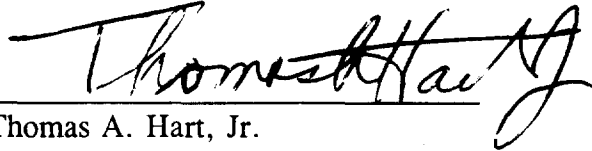
## **II. CONCLUSION**

Omnipoint has attempted to maliciously undermine one of the most significant initiatives to assist small businesses in this nation's history. They must be held accountable and severely sanctioned.

As a result of Omnipoint's misrepresentations of its true anticompetitive intentions, its lack of candor, and its protracted efforts to abuse the Commission's and Court's processes, its pioneer preference license should be denied. The Commission itself concluded that Omnipoint's deliberate attempt to delay the auction process was done in bad faith to "advance its own economic position in the New York market". The resulting erosion of competition in Block C, particularly in the New York MTA, should be viewed as evidence of strike intent, especially in light of the benefits resulting from its unique status as a preference licensee. After stripping Omnipoint of its license, the Commission may exercise a number of options to assure that it will recoup the maximum value from the license, principal among them being to resell the license as part of the C Block auction.

Accordingly, Petitioners request that the Commission designate for a hearing the license awarded to Omnipoint concerning those issues involving Omnipoint's anticompetitive behavior and ultimately deny its pioneer preference license for the New York MTA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas A. Hart, Jr.", written over a horizontal line.

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Attorneys for Petitioners

Whitestone Wireless, L.P.  
Southern Personal Communications Systems  
Minco P.C.S.

September 21, 1995

**AFFIDAVIT**

CITY OF NEW YORK                                }  
  }SS:  
STATE OF NEW YORK                                }

I W. Brian Maillian, being first duly sworn, depose and state as follows:

1. I am Chief Executive Officer of the Whitestone Capital Group, Inc. ("Whitestone"), an investment banking firm established in 1993. Whitestone has affiliated companies including Whitestone Capital Markets, L.P., Whitestone Capital Partners, Inc., and Whitestone Wireless Enterprises, L.P. ("Whitestone Wireless, L.P."). The Principals of Whitestone have extensive and diversified investment banking experience. Specifically, the Principals have: participated in over \$5 billion of financings involving mortgage and asset backed securities, debt and equity securities, and mergers and acquisitions; garnered approximately 80 years of investment banking experience from many of the top firms in the financial services industry; served in senior level positions in virtually all areas of capital markets, sales and trading, and investment banking at major Wall Street firms, commercial banks, and consulting firms; and established long standing personal relationships with senior level officers of investment banks, corporations, investment management firms and government entities. I have personal knowledge of the matters set forth herein.

2. Whitestone Wireless, L.P. has its principal offices in New York and is planning to bid on PCS licenses to be auctioned by the FCC and to build and operate PCS systems. Whitestone Wireless, L.P. has total assets of less than \$500 million, and qualifies to bid as a "small business" in the FCC Block C PCS auction and intends to do so. Furthermore, Whitestone Wireless, L.P.'s "control group," as defined in the FCC rules, will hold a majority of the voting stock of the Company and more than 25% of its equity. A majority of the voting stock of the control group will be held by Whitestone Wireless Enterprises, Inc., a small business and the general partner of the limited partnership. Thus, Whitestone Wireless, L.P. meets the FCC's requirements as a small business.

3. Whitestone Wireless, L.P. was formed to bid for and win licenses in the C Block auction. Raising investment for PCS has proven to be extremely difficult. Whitestone Wireless, L.P. has had some success in raising equity investment and, at the time the Omnipoint stay was granted, was close to obtaining substantial additional equity investment, all of which would have positioned Whitestone Wireless, L.P. to bid for markets well in excess of 50 million in population. Many of the BTA's in the New York MTA are representative of these types of markets. In addition, Whitestone Wireless, L.P. has undertaken measures to enter into agreements with strategic partners for operating support, PCS equipment, and engineering and construction services necessary to completely build out PCS systems and operate in numerous markets. Since the grant of the Omnipoint stay, investor, strategic partner and vendor interest has diminished substantially.

4. **Whitestone Wireless, L.P.** has incurred substantial expenses in preparation for the FCC C Block auction including preparing a private placement memorandum, utilizing computers and software to analyze market data, hiring consultants and contractors to perform research and analysis, and retaining other professionals to provide specialized expertise prior to, during, and after the auction. Some of these services were time-sensitive and will have to be repeated when the auction is rescheduled.

5. The resulting delay from Omnipoint's stay of the Block C auction has damaged **Whitestone Wireless, L.P.** The Company's working capital to support operating expenditures must be stretched to cover the period since July 24, 1995. As an investment banking firm, **Whitestone** has experienced first-hand the apprehension of investors in seeking to finance auction-related ventures. In fact, most investors have become extremely uneasy about the continuing legal disruptions of this auction. The current delay in the auction, caused by the stay requested by Omnipoint, places **Whitestone Wireless, L.P.** in considerable financial jeopardy and threatens the company's ultimate success.

6. **Whitestone Wireless, L.P.** plans to submit bids for BTA's in the New York MTA. **Whitestone Wireless, L.P.** plans to compete with Omnipoint in that market, and because of that company's anticompetitive conduct has suffered and will continue to suffer a severe disadvantage.

7. The new delay in the Block C auction has caused us to lose a substantial amount of momentum in developing a PCS business. We are a small company without the resources of a major operating company necessary to sustain a lengthy delay. It is urgent to prevent Omnipoint from unfairly gaining further entrenchment in the New York market. **Whitestone** is located in New York, and has an undeniable interest in owning and operating a PCS system and competing with Omnipoint in the region.

8. Furthermore, as an investment banking firm, **Whitestone** has advised clients concerning investment in telecommunications properties, particularly PCS. Moreover, **Whitestone** is a potential PCS customer and is thus concerned with the character qualifications of all licensees serving that market. Omnipoint's anticompetitive actions are of particular concern since they will likely cause delay, excessive prices and deficient service to consumers (like **Whitestone**) in the New York area. I believe Omnipoint has made misrepresentations and displayed bad faith to the Commission, and therefore do not believe the company will serve the public interest by operating its PCS license or licenses in a forthright manner.



The facts herein are true and accurate to the best of my knowledge and belief.



W. Brian Maillian

Subscribed and sworn to before me this 21<sup>st</sup> day of September, 1995.



Notary Public

My commission expires: 5-14-00

STATE OF CALIFORNIA  
NOTARY PUBLIC  
My Commission Expires May 14, 2000

## AFFIDAVIT

CITY OF MEMPHIS            }  
                                  }SS:  
STATE OF TENNESSEE        }

I, George Dobbins Jr., being first duly sworn, depose and state as follows:

1. I am President and Chairman of the Board of Directors of Southern Personal Communications Systems ("SPCS"). SPCS was formed to bid in the upcoming Broadband PCS frequency auctions under the Designated Entity (DE) or small business provisions of the Federal Communications Commission ("FCC"), allowing the Company to receive a 25% bidding credit. Under these provisions, SPCS will only have to pay a down payment of 10% of the amount of the winning bid, and will pay interest only for six years at a 10 year treasury note rate. Thus, SPCS has solicited sufficient capital to mount a viable competitive bid. The actions of Omnipoint Communications Corporation ("Omnipoint") have thwarted the realization of that opportunity.

2. SPCS has total assets of less than \$300 million and gross revenues of less than \$125 million, and thus qualifies as a "small business" under the Commission's rules. SPCS retained outside consultants and prepared a detailed business plan for its involvement in PCS industry. We had planned to bid for licenses in Basic Trading Areas (BTAs) including but not limited to Memphis, Nashville, and Knoxville, Tennessee; Birmingham, Alabama; Charlotte and Raleigh, North Carolina; Greenville, South Carolina; and Atlanta, Georgia. We are also considering mid-sized markets in New Jersey, New York and Connecticut. However, following Omnipoint's stay of the auction, these plans have been setback and jeopardized.

3. The telephone service competition for PCS is in three main areas; cellular, wireline and other PCS companies occupying the same markets. The effect of the Omnipoint stay has been to allow winning bidders in Block A and Block B to progress toward building-out and operating a PCS system at a much faster rate than potential C Block winners. The head-start unfairly afforded Omnipoint, I believe, will make it virtually impossible for C Block winners to compete for antenna sites, technical facilities, and customers in the New York MTA.

4. Based on preliminary engineering data contained in our business plan SPCS is faced with payments including base station, software, engineering, site preparation, maintenance and monitoring, transmission cost, as well as brand development and national advertising. Other operating costs include clearing microwave spectrum, rental of cells, and inter-connection to public networks. The capital needed for a small PCS provider like SPCS to build-out and operate a PCS system is formidable. The longer the C-Block auction is delayed, the more difficult it will become for SPCS to retain the interest of investors and ultimately raise capital to submit competitive bids and thereafter build and operate a successful service.


5. I am familiar with the Petition to Deny Omnipoint's license to which this affidavit is attached. I agree that Omnipoint has deliberately delayed the C block auction to gain a

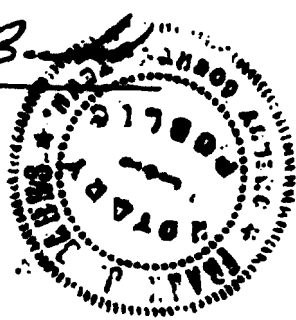
competitive advantage to the detriment of potential bidders including SPCS. I also agree that the FCC should act to make Omnipoint accountable for its anti-competitive and malicious actions which has caused substantial harm and economic injury to SPCS and other potential C Block bidders.

The facts herein are true and accurate to the best of my knowledge and belief.

  
George Dobbins, Jr.

Subscribed and sworn to before me this 20 day of September, 1995.

  
Notary Public



My Commission expires: 10/10/95

## **AFFIDAVIT**

**CITY OF LOS ANGELES**

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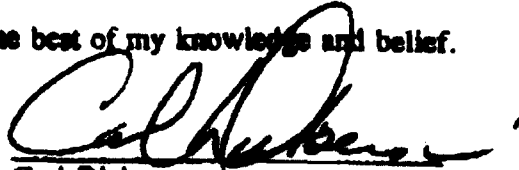
**STATE OF CALIFORNIA**

**I, Carl Dickerson, being first duly sworn, depose and state as follows:**

- 1. I am Chief Executive Officer of Minco PCS ("Minco"). Minco was formed to bid on PCS licenses to be auctioned by the FCC. Minco plans to seek licenses in many Basic Trading Areas ("BTAs"). A few may fall within the New York Major Trading Area ("MTA"). Its principals have substantial telecommunications experience as senior executives of a number of telecommunications companies. Many of the principals have direct experience in wireless technologies. Minco's principals have developed innovative technologies such as "Wireless Roadside Assistance Service". The experience and ingenuity of the principals would well serve the company in a fair competition with Omnipoint Communications Corporation ("Omnipoint").**
- 2. Minco is planning to bid for and win licenses in the C Block auction. The company has been active in FCC proceedings related to the auction process, and has filed comments in the Federal Communications Commission proceeding involving Implementation of Section 309(j) of the Communications Act - Competitive Bidding. I am convinced that further delaying the Block C auction will have profound negative impact upon small businesses like Minco who plan to bid for PCS licenses. Specifically, already scarce investment capital will all but evaporate since those investing in the C Block bidders remain concerned about the head-start of the A and B block licensees such as Omnipoint. The reduction in the number of small businesses bidding in the Block C auction will hinder competition in the PCS industry.**
- 3. The company has total assets of less than \$500 million, and qualifies to bid as a "small business" in the Block C auction. We do not possess the resources of a major operating company necessary to weather an extended delay of the C Block auction.**
- 4. Minco developed a business plan in preparation for bidding in the C Block. Though raising investment for PCS has proven to be a challenge, at the time the Omnipoint map was granted, Minco had secured financial commitments of necessary capital to bid in the C Block. These commitments would have positioned Minco to bid for markets well in excess of 25 million in population and would have allowed the company to compete with A and B Block winners. However, Omnipoint's anticompetitive conduct has severely disadvantaged Minco's ability to compete. In addition to increasing the difficulty to maintain adequate financing to make a competitive bid, Omnipoint has fashioned for itself what very well may be an insurmountable head-start in establishing and operating a PCS system in the New York MTA.**

5. I am familiar with the Petition to Deny Omnipoint's license to which this affidavit is attached. I agree that Omnipoint has deliberately delayed the C Block auction to gain a competitive advantage to the detriment of potential bidders including Minco. I also agree that the FCC should act to make Omnipoint accountable for its anti-competitive and malicious actions which have caused substantial harm and economic injury to Minco and other potential C Block bidders.

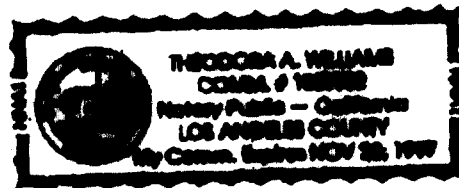
The facts herein are true and accurate to the best of my knowledge and belief.

  
Carl Dickerson.

Subscribed and sworn to before me this 20<sup>th</sup> day of September, 1995.

  
Notary Public

My Commission expires: 11-28-97



**CERTIFICATE OF SERVICE**

I, Laura P. Minor, do hereby certify that a copy of the attached PETITION TO DENY AWARD OF PIONEER PREFERENCE LICENSE TO OMNIPOINT CORPORATION was served this 21st day of September, 1995 to the following persons by first class mail, postage prepaid:

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